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IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

THE LEAGUE OF WOMEN VOTERS OF ARKANSAS, ARKANSAS UNITED, DORTHA DUNLAP, LEON KAPLAN, NELL MATTHEWS MOCK, JEFFREY RUST, and PATSY WATKINS,

PLAINTIFFS

v. **CASE NO. 60CV-21-3138**

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas; and SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, JAMES SHARP, and J. HARMON SMITH, in their official capacities as members of the Arkansas State Board of Election Commissioners,

DEFENDANTS

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PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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I. Introduction

Plaintiffs are five senior citizens with various medical conditions, and two non-partisan non-profit organizations, with members statewide, that promote civic engagement and robust participation in our democracy. Plaintiffs seek declaratory and injunctive relief against four revisions to Arkansas law enacted in 2021 (collectively, the "Challenged Provisions") that violate their rights to vote, speak, and assemble, and to the equal protection of the law under the Arkansas Constitution. Defendants' motion for summary judgment should be denied. Defendants claim that (1) none of the Plaintiffs have standing to bring these claims; (2) none of the Challenged Provisions implicate fundamental rights, let alone abridge them; and (3) that Defendants are entitled to sovereign immunity. Defendants are wrong on all counts.

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II. Background

After this Court denied Defendants' motion to dismiss, Defendants filed an interlocutory appeal on the issue of sovereign immunity. That appeal is briefed and pending before the Supreme Court. The parties have completed discovery, including fourteen (14) depositions, interrogatories, and the exchange of approximately 5,500 documents.

III. Counterstatement of Undisputed Material Facts

A. Plaintiffs are Arkansas voters and organizations dedicated to promoting civic engagement and voting.

Plaintiffs are five Arkansas voters ("Voter Plaintiffs") and two organizations ("Organizational Plaintiffs").

- Plaintiff Patsy Watkins is a 73-year-old registered voter in Fayetteville and a member of the League of Women Voters. Ex. A, Watkins Dep. 4:12-14, 5:6-18, 6:7-9;[1] *see also* Pls.' Am. Compl. ¶ 21.

[1] All citations to exhibits herein are to those exhibits as defined in and appended to Plaintiffs' Response to Defendants' Motion for Summary Judgment which has been filed herewith.

- Plaintiff Nell Matthews Mock is a 73-year-old registered voter in Little Rock and a member of the League of Women Voters. Ex. B, Mock Dep. 8:24-9:1, 10:7-8, 19:19-20.

- Plaintiff Dortha Dunlap is an 86-year-old cancer survivor, registered voter in Springdale, and member of the League of Women Voters. Ex. C, Dunlap Dep. 4:11-13, 5:12-15, 6:3-7, 6:10-13, 8:11-13.

- Plaintiff Leon Kaplan is a 79-year-old registered voter in Little Rock. Ex. D, Kaplan Dep. 4:12-13, 7:7-8, 7:22-24.

- Plaintiff Jeffrey Rust is a 69-year-old registered voter in Fayetteville. Ex. E, Rust Dep. 9:19-10:5; *see also* Pls.' Am. Compl. ¶ 20.

The League of Women Voters of Arkansas (the "League") is a nonprofit nonpartisan membership organization that educates citizens about voting rights and the electoral process, and facilitates voting through Get Out the Vote efforts, voter registration drives, and voter support efforts. Ex. F, Miller Dep. 13:4-14. The League has 323 dues-paying members in Arkansas, some of whom are Black. *Id.* 8:6-16, 8:20-9:1. The League hosts monthly trainings on how to register voters. *Id.* 13:15-14:11. "[P]art of [the] voter education" is "new laws that affect voting and how somebody can vote." *Id.* 27:18-28:28.

Arkansas United ("AU") is a 501(c)(3) membership organization in Springdale, Arkansas. Pls.' Am. Compl. ¶ 15. AU has both Hispanic and Black members. Ex. G, Reith Dep. 6:25-7:6. Its mission is to promote and provide services to Arkansas' immigrant population, including to promote civic engagement and democratic participation. *See id.* 21:5–9; *see also* Pls.' Am. Compl. ¶ 15. AU educates its members and supporters so they have information and resources to cast ballots that are counted. Ex. G, Reith Dep. 5:15-20. This includes "translation into Spanish and Marshallese about the process for voting and . . . key deadlines and any changes that may have occurred since the previous election." *Id.* 5:21-6:4.

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B. Arkansas has had low voter turnout for more than a decade.

Even before the Challenged Provisions were enacted, Arkansas had a remarkably restrictive voting regime. Ex. H, Mayer Rep. at 6. This has contributed to low turnout for at least the past fourteen years. *See id.* at 6, 12. In nearly every general election since 2008, Arkansas ranked among the bottom ten states for voter turnout.[2] *Id.* at 6–7. In 2020, voter turnout increased dramatically. *See id.* at 7 fig.1. More than 115,000 voters cast absentee ballots in the 2020 presidential race than in the 2016 general election, when fewer than 43,000 Arkansans voted absentee. *See id.* ¶ 41. Secretary of State John Thurston (the "Secretary") described the 2020 general election as "one of the most successful elections in state history," indicating that the rise in turnout did not result in election administration problems. Ex. I, Secretary Press Conference 3:7–9.

C. Arkansas has experienced virtually no voter fraud.

Voter fraud in Arkansas is "vanishingly" rare. *See* Ex. H, Mayer Rep. at 16. Only four confirmed cases of voter fraud have occurred in the past 20 years out of tens of millions of ballots. *Id.* at 15–16. Ultimately, "[t]he total rate of absentee ballot fraud over this period is in the range of 0.0002%." *Id.* at 16.

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Even with the significant increase in turnout, the 2020 general election was no different. The Secretary's Office is unaware of any verified voting fraud that occurred during the 2020 general election via absentee ballot, affidavit, or otherwise. *See* Ex. J, Rule 30(b)(6) Deposition of Joshua Bridges on behalf of the Secretary's Office ("Bridges Dep."), 51:1-6. Likewise, the Board is unaware of any voter fraud in the 2020 general election and has no reason to doubt the integrity of the 2020 general election. Ex. K, Shults Dep. 172:5-173:1 176:19-177:5. The Board has a sound

[2] The only general election between 2008 and 2020 in which Arkansas was not in the bottom ten states for voter turnout was 2014, when national turnout was at its lowest level since 1942. Ex. K, Mayer Rep. at 6–7.

process with safeguards in place that makes voter fraud as unlikely as possible, *id.* at 177:19-179:5, and none of the 75 county boards of election commissioners reported any evidence of voter fraud in the 2020 general election. Ex. H, Mayer Rep. at 43.

Based on evidence from the last 20 years, there is simply "no material voter fraud in Arkansas, and nothing even hinting that Arkansas elections are not secure." *Id.* at 17.

D. The General Assembly passed the Challenged Provisions in 2021, burdening Arkansans' right to vote.

1. Act 736 (the "Absentee Application Signature-Match Requirement") strictly limits the comparator signatures that can be used to verify a voter's absentee ballot application.

Act 736's Absentee Application Signature-Match Requirement requires untrained election officials to examine and verify voters' absentee ballot applications through the unreliable practice of signature-matching while using only a single comparator: the signature on the individual's voter registration application. Ark. Code Ann. § 7-5-404 (2021); *see also* Ex. K, Shults Dep. at 140:6-141:1 (the registration signature is the only valid comparator under Act 736); *id.* 139:14-140:4 (no training by the Board); Ex. J, Bridges Dep at 130:13-21 (no training by the Secretary's Office); *id.* at 131:3-4 (no training by the counties).

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Before Act 736, election officials could use any signature in a voter's registration record as a comparator to the signature on the voter's absentee ballot application. Ark. Code Ann. § 7-5-404(a)(1)(A) (2019); *see also* Ex. K, Shults Dep. at 140:6-141:1. If an individual who submitted an absentee ballot application pre-Act 736 did not have a voter registration application signature on file, the clerk's office would attempt to obtain a signature for the voter from "retained paper poll books or early vote request sheets." Ex. L, 2020-039 Inves. Rep.; *see also* Exhibit M, video of absentee ballot application processing prior to Act 736 ("Hollingsworth Vid.").

Dr. Kenneth Mayer, Professor of Political Science at the University of Wisconsin, Madison, confirms that academic literature has "proven" that signature matching in the election context relies "on entirely subjective standards that vary from one jurisdiction to the next and even from one person to another." Ex. H, Mayer Rep. at 24. "Even in states that devote considerable resources to establishing uniform practices and training, county officials use varying methods and standards." *Id.*. Indeed, the rates of absentee ballot rejections for signature mismatches vary across Arkansas's counties, which is "very likely a reflection of inconsistent standards in counties." *Id.*. This observation is consistent with data from other states. *See id.* & n.39.

In the General Assembly, Representative Mark Lowery, in defending another Challenged Provision—the Affidavit Prohibition in Act 249 (discussed below)—explained that signature matching is a deeply flawed process "ripe with errors." Ex. M, Rep. Lowery Test., at 37:13 Representative Lowery admitted it is deeply problematic to "ask[] our election workers, many of them who are not trained in verifying signatures, . . . to do it in seconds," while some forensic analysts say it can take "hours" to verify a signature. *Id.* at 19:15-17.

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As untrained laypersons, election officials are more prone to make erroneous rejections, rather than erroneous acceptances, in part because they are likely unaware of and unable to account for reasons signatures naturally vary among certain populations, such as those with less formal education, those who speak English as a second language the elderly, disabled, and those suffering from adverse health conditions. *See* Ex. N, Mohammed Aff. ¶ 32. Indeed, untrained lay persons are 3 ½ times more likely to erroneously reject an authentic signature than trained forensic document examiners. *Id.* ¶ 34.

The Absentee Application Signature-Match Requirement increases the likelihood that election officials will make mistakes when comparing signatures and erroneously reject

applications as a result. *Id.* ¶ 32. The fewer signatures available to use as comparators, the higher that rate climbs and the more erroneous rejections are made. *See id.* One comparator simply does not provide enough samples for examiners "to account for an individual's signature variability." *Id.* ¶ 30. The unreliability of the Absentee Application Signature-Match Requirement is exacerbated by the fact that it does not require the use of the proper equipment to illuminate and magnify signatures for examination and comparison. *See id.* Moreover, neither the Secretary, the Board, nor the counties provide *any* training on how to compare signatures. Ex. K, Shults Dep. 138:11-139:13, 140:6-141:1; Ex. J, Bridges Dep. 130:22-131:4.

2. Act 973 (the "In-Person Ballot Receipt Deadline") prohibits voters from delivering absentee ballots in person after the Friday preceding election day, even though mailed-in absentee ballots are permitted after that date.

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Act 973's In-Person Ballot Receipt Deadline reduces the number of days voters have to return absentee ballots in person versus by mail, and thereby creates separate and arbitrary deadlines that depend on how an absentee ballot is returned. *See* Ark. Code Ann. §§ 7-5-404 (2021), 7-5-411 (2021). Act 973 moves the deadline for delivery of absentee ballots in person from the Monday before Election Day to the close of business of the county clerk's office on the Friday before Election Day. *Id.* § 7-5-411(a)(3), (4) (2021). Meanwhile, absentee ballots returned by mail are timely if received by 7:30 p.m. on Election Day. *Id.* § 7-5-411(a)(1)(A) (2021).

Dr. Mayer found that in the 2020 general election, even looking only to a small subset of counties for which data was available, over 500 of the state's voters returned their absentee ballots in person during that now-eliminated three-day window. Ex. H, Mayer Rep. at 20-21. Over the last four years in that subset of counties, more than 1,000 absentee ballots were returned in person during the three-day window. *See id.* The Governor even refused to sign the bill because it

"unnecessarily limits the opportunities for voters to cast their ballot prior to the election." *See* Ex. S, Governor Statement at 3.

The Board claims that the arbitrary and confusing deadlines created by Act 973 will alleviate the administrative burden of "foot traffic" at the county clerk's offices before election day. Ex. J, Bridges Dep. 110:21-111:11. But neither the Secretary's Office nor the Board know how many absentee ballots were returned in person in any prior election. *See id.* 115:11-14; *see also* Ex. K, Shults Dep. 96:1-5. The Board has never received complaints from county clerks' offices that the Monday deadline for in-person drop-off of absentee ballots was burdensome. Ex. K, Shults Dep. 168:13-20. And the Secretary's Office admitted that the process for hand delivering an absentee ballot is essentially the same as the process for in-person early voting, which is permitted through the Monday before election day. *See* Ex. J, Bridges Dep. 113-14.

Susan Inman, a current Election Commissioner for the Pulaski County Board of Election Commissioners, testified that requiring all in-person drop-offs of absentee ballots to occur the Friday does not eliminate any administrative burden on election officials, because "the process is quite organized and the workers in charge of doing the canvas and managing that effort are well trained and able to handle it." Ex. O, Inman Dep. 31:20-32:10. Commissioner Inman did agree, in response to Defendants' hypothetical, that it could be chaotic if all absentee ballots came in the Monday before election day, *see id.* 29:24-30:4, but there is no evidence to even suggest that would occur without Act 973. *See* Ex. H, Mayer Rep. at 20-21.

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3. Act 249 (the "Affidavit Prohibition") transforms Arkansas into a strict voter ID state, disenfranchising voters who lack qualifying identification.

The Affidavit Prohibition eliminates a vital failsafe for voters who lack qualifying identification. Ex. H, Mayer Rep. at 18. Previously, a voter without compliant photo identification could cast a provisional ballot that would be counted, without any further action, if the voter

completed an affidavit under penalty of perjury at the polls (or, if voting absentee, completed and returned a sworn statement) stating they are a registered voter (the "Affidavit Fail-Safe"). Ark. Const. amend. 51 § 13(b)(4)(A)(i)(a) (amended 2021). The Affidavit Prohibition removes that option, requiring an individual who does not present a compliant identification (either in person or enclosed with their absentee ballot) to return to the county board of elections in person within six days after election day to present compliant photo identification. Ex. H, Mayer Rep. at 6 & n.10, 19. Thus, the Affidavit Prohibition transforms Arkansas's voter identification regime from a non-strict voter identification regime—one with a failsafe option for voters without qualifying identification—to a strict voter identification regime—one that provides no option for voters who do lack compliant photo identification to vote. *Id.* at 6 & n.10.

During the 2020 general election, 1,612 voters in Pulaski County alone avoided disenfranchisement by using the Affidavit Fail-Safe. Ex. H, Mayer Rep. at 19. Eliminating the Affidavit Fail-Safe introduces a new obstacle to the voting process and, for absentee voters, imposes disproportionately significant burdens on those who lack technology to copy and print their identification, or lack the ability to present identification in person because of illness, infirmity, or limited mobility. *Id.* at 19.

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The purported justification for the Affidavit Prohibition is to prevent voter fraud. Ex. K, Shults Dep. 53:11-54:5. Yet the both the Board and the Secretary conceded that they have no indication that the affidavit has *ever* been used in furtherance of fraud since it became an option for voters in 2017. *Id.* 56:3-57:3, 57:22-58:5, 58:15-22; Ex. J, Bridges Dep. 59:8-60:2; *see also* Act 633 (2017).

Defendants also argue that the Affidavit Prohibition is a "step in the implementation of Act 99's photo ID requirements." Defendants' Br. in Support of Mot. for Summ. J. ("Defs.' Br.") at

38. But the Board admits that "Amendment 99 did not require the enactment of Act 249." Ex. K, Shults Dep. 50:8-10; *see also id.* 49:16-50:7.

4. Act 728 (the "Voter Support Ban") restricts access to the 100-foot perimeter surrounding a polling place to those with a "lawful purpose."

The Voter Support Ban prohibits anyone from entering or remaining within a 100-foot perimeter of a polling place's main entrance unless they are entering or leaving the building for "lawful purposes." *See* Ark. Code Ann. § 7-1-103(a)(23) (2021). Violations are a class A misdemeanor, with a fine of up to $2,500 and up to one year in jail. *Id.* §§ 5-4-201(b)(1) (2009), 5-4-401(b)(1) (2019); *see also id.* § 7-1-103(b)(1) (2021). An individual convicted under the law becomes "ineligible to hold any office or employment in any of the departments in" the State, and if they violate the Ban while employed by the State, they "shall be removed from employment immediately." *See id.*

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The Secretary's Office could neither explain nor define a "lawful purpose," and testified that only an attorney could properly opine on its meaning. *See* Ex. J, Bridges Dep. 146:7-148:12. On the other hand, the Board defined a lawful purpose as "any purpose that's not illegal" or not listed in the criminal code. Ex. K, Shults Dep. 103:12-104:18.

The Board then changed its response, stating that, in addition to prohibiting criminal activity within 100-feet of a polling place, *see id.* 103:12-104:18, Act 728 also prohibits *any* entry within the 100-foot perimeter except for individuals leaving or entering a place where voting is occurring, whether those individuals are breaking any law or not. *Id.* at 105:4-18 (stating that the Voter Support Ban "prohibits a person from entering the [100-foot] zone without the purpose of ingressing and egressing" the polling place); *id.* 110:5-9 ("[Act 728] prohibits a person from setting up a table or a booth or just standing there for the purpose – for some purpose other than going in or out of the building."); *id.* 108:21-109:1, 125:5-10. In contrast, the Secretary's Office believes

that Act 728 contains an explicit list of who is permitted within the 100-foot zone. Ex. J, Bridges Dep. 150:4-22 ("I believe that the wording of the law says 'A person shall not enter a polling place except,' and then it begins listing individuals and situations to where certain people can be within that -- or in that area."). But Act 728 contains no such list.

Defendants again changed their position on the meaning of Act 728 the day after filing the instant motion. On January 11, 2022, the Board issued a Notice of Final Action and Letter of Instruction to El Dorado Mayor Veronica-Smith Creer, in which it discussed the scope and meaning of Act 728. Ex. P, Creer Letter. The Board stated:

> Act 728 prohibits a person from loitering within the 100-foot zone, and requires that any person in that zone be either entering (i.e. going into the building to vote, or waiting in line to vote) or egressing the polling location. Similarly, if the polling location is near other businesses or buildings that serve other purposes, a person may transit the 100-foot exclusionary zone to enter or exit the other business or building. However, the person may not loiter in the zone and engage in conversation with voters waiting in line to vote.

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Id. at 2. Based on this definition, the Board concluded that Act 728 "specifically prohibits [the Mayor's] broadcasting Facebook live videos regarding the election within the 100-foot exclusionary zone." *Id.* The Board warned Mayor Creer that "[w]hile [her] videos were about the length of the line and the speed to which voters were being processed, under Act 728 . . ., if [she] ma[d]e that same video in future elections, [she] could be found as violating that prohibition." *Id.*

Senator Kim Hammer, the primary sponsor of the Ban, acknowledged in a legislative hearing that the Ban grew out of concerns about groups "handing out bottled waters and other things," and was therefore designed to prohibit such conduct. Ex. Q, Sen. Hammer Test. at 10:2-13 ("Some were wearing T-shirts that identified the group that they were with and it's just the common opinion on this Senator . . . that that hundred-foot zone ought to be considered sacred for

all purposes and nobody camping out inside that. . . ."). Another legislator cited claims about individuals "handing out water . . . [and] sandwiches being handed out" in discussing the law. Ex. H, Mayer Rep. at 21. Defendants' brief in support of their motion to dismiss aligned with the view that Act 728 prohibits the expressive conduct of personally providing free water or snacks to voters waiting in line within 100-feet of a polling place. *See* Defs.' Br. in Supp. of Mot. to Dismiss at 22 (stating only that "Act 728 does not prevent any organization . . . from *leaving coolers* full of water or snacks within 100 feet of the 'primary exterior entrance to a building, where voting is taking place . . .'" (emphasis added)); *see also* Ex. R, Stein Dep. 219:5–220:8. However, Defendants' brief in support of their motion for summary judgement then changed course. *See* Defs.' Br. at 51 ("[N]owhere does the Act mention handing out water to anyone.").

Defendants also claim that the Voter Support Ban prohibits electioneering and loitering. Ex. K, Shults Dep. 99:10-101:21 ("I think the state interest is essentially coextensive with the state interest in prohibiting electioneering, that the voters . . . in . . . the building and that immediate proximity to the building are left unmolested by people who wish to be present for whatever reasons to influence their conduct at the poll. . . It's about prohibiting people – I know loitering is a technical term, but for simplicity, people camping out in the zone . . ."); Ex. J, Bridges Dep. 137:10-18. But there is no dispute that both electioneering within the 100-foot perimeter, and "loitering," in general, were already prohibited before Act 728. *See* Ex. J, Bridges Dep. 143:1-4.

The Board has yet to provide training to election officials on what "lawful purpose" means. *See* Ex. K, Shults Dep. 114:10-15. And the Board has also failed to update the County Board of Election Commissioners Procedure Manual or its Training Guide and Checklist for Poll Workers, on which local election officials and poll workers rely, even though multiple local elections have been held since the Voter Support Ban was enacted. *See id*. 115:8-117:20.

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Not surprisingly, Plaintiffs are equally confused about what Act 728 prohibits and allows. Ms. Watkins testified that, in her view, the Voter Support Ban is "vague and open to question about . . . what a lawful purpose is," which creates "potential for confusion. . . ." Ex. A, Watkins Dep. 21:20-22:4. Mr. Rust explained that the Voter Support Ban "sounded vague to [him, and] that it would kind of depend on how they wanted to interpret it. [The law] said 'a lawful purpose,' and [he] do[esn't] think it specifies what that is." Ex. E, Rust Dep. 47:9-12. And Mr. Kaplan testified that he is concerned about whether his daughter will be permitted within 100 feet of the polling place under the Voter Support Ban. Ex. D, Kaplan Dep. 29:10-14.

IV. Legal Standard

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Summary judgment is appropriate only when there is no "genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law." *Flentje v. First Nations Bank of Wynne*, 340 Ark. 563, at 570, 11 S.W.3d 531, 536 (2000). The moving party bears the burden of demonstrating it is entitled to summary judgment, and "[a]ll proof submitted must be viewed in a light most favorable to the party resisting the motion, [with] any doubts and inferences . . . resolved against the moving party." *Cash v. Lim*, 322 Ark. 359, at 362, 908 S.W.2d 655, 656 (1995) (quoting *Oglesby v. Baptist Med. Sys.*, 319 Ark. 280, at 284, 891 S.W.2d 48, 50 (1995)).

Even if the moving party bears its initial burden, summary judgment is inappropriate when, in response, the non-movant demonstrates a genuine issue of material fact. *Wallace v. Broyles*, 331 Ark. 58, at 66, 961 S.W.2d 712, 715 (1998). Moreover, "summary judgment is not proper where evidence, although in no material dispute as to actuality, reveals aspects from which inconsistent hypothes[e]s might reasonably be drawn and reasonable minds might differ." *Thomas v. Sessions*, 307 Ark. 203, at 208, 818 S.W.2d 940, 943 (1991).

Ultimately, the purpose of summary judgment proceedings is "to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied." *Wallace v. Broyles*, 332 Ark. 189, 192, 961 S.W.2d 712, 723 (1998).

V. Discussion[3]

A. Plaintiffs have standing.

Defendants argue that all Plaintiffs lack standing, primarily based on a misapplication of inapplicable *federal* standing principles to this *state* constitutional challenge. But Arkansas's standing law leaves no question: both the individual and organizational plaintiffs have standing to challenge the Challenged Provisions.

1. Arkansas's standing jurisprudence applies here.

First, Defendants ignore Arkansas's standing requirements and instead cite irrelevant case law applying the requirements of Article III of the U.S. Constitution. This law simply does not apply where Arkansas has a well-developed standing doctrine of its own. *Ark. Beverage Retailers Ass'n, Inc. v. Moore*, 369 Ark. 498, 509, 256 S.W.3d 488, 496 (2007) (explaining "there is no need

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[3] In addition to the arguments addressed below, Defendants repeat two *legal* arguments already rejected by this Court in its denial of Defendants' motion to dismiss. Specifically, Defendants assert on summary judgment that Plaintiffs lack standing because the Defendants will not cause and cannot redress their injuries, Defs.' Br. at 24–25, and that Plaintiffs have failed to name indispensable parties—namely, officials from *each* of Arkansas's *75* counties, *id.* at 26–28. These arguments do not involve any issues of fact, no matter how hard Defendants try to shoehorn in such issues. Plaintiffs will not waste the Court's time by repeating verbatim the legal arguments on these points from their opposition to Defendants' motion to dismiss and therefore simply incorporate those arguments by reference here. Pls.' Br. in Opp. To Defs.' Mot. to Dismiss Am. Compl. at 15–22. In any event, there is ample evidence in the record, including through Defendants' own admissions, that they possess enforcement authority over election laws including the Challenged Provisions, are charged with administering and ensuring compliance with election laws including the Challenged Provisions, are obligated to train local election officials on election laws including the Challenged Provisions. *See e.g.*, Ex. K, Shults Dep. 27:4-6 (confirming the duties of the Board's Director involve interpreting and applying Arkansas' election laws); *id.* 43:5-12 (explaining that the Board's "job is to enforce" election laws); *id.* 67:17-68:5 ("Our job is to inform the county election officials what their requirements are under the law."); 30:3-5, 31:11-19, 33:18-34:13, 35:16-18, 119:9-120:16; 122:7-9. As well as evidence that Defendants have been derelict in those duties, by continuing to post and publish stale and inaccurate information on their websites, including inaccurate training materials for election officials. *See* Ex. U, Training and Res. Page; Ex. K, Shults Dep. 61:10-22; s*ee also id.* 59:7-61:9, 70:15-72:5. The Secretary's Office further conceded that voters would be "[c]onfused and misinformed . . . if they relied on this current setting of the website," and that reliance such misinformation could result in disenfranchisement. Ex. J, Bridges Dep. 102:10-105:11.

for Arkansas courts to resort to the requirements for standing under" federal statute when state law details standing).[4] "[S]tanding in Arkansas courts is a question of state law, and federal cases based on Article III of the U.S. Constitution are not controlling." *Chubb Lloyds Inc. Co. v. Miller Cnty. Cir. Ct., Third Div.*, 2010 Ark. 119, at *11, 361 S.W.3d 809, 815 (2010) (internal quotation marks omitted); *see also* Ark. Civil Prac. & Proc. § 7:3 (5th ed.) (same); *Jegley v. Picado*, 349 Ark. 600, 616, 80 S.W.3d 332, 339 (rejecting federal cases' discussion of standing because "neither case is binding on this court's determination of whether a justiciable controversy exists in the case now before us").

In Arkansas courts, "a litigant has standing to challenge the constitutionality of a statute if the law is unconstitutional as applied to that particular litigant." *Ghegan & Ghegan, Inc. v. Weiss*, 338 Ark. 9, at 14-15, 991 S.W.2d at 539 (1999). A plaintiff "must have suffered injury or belong to a class that is prejudiced in order to have standing to challenge the validity of a law." *Id*. This is not an onerous requirement: Plaintiffs need only "show that the questioned act has a prejudicial impact on them." *Martin v. Kohls*, 2014 Ark. 427, at 8, 444 S.W.3d 844, 849 (2014) (citations omitted).[5]

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2. The Voter Plaintiffs have standing.

As the Court held in denying Defendants' motion to dismiss, individual plaintiffs have standing to challenge voting-related laws "by virtue of their status as registered voters; nothing more is required." Order Den. Mot. to Dismiss at 3 (citing *Martin v. Haas*, 2018 Ark. 283, at 8,

[4]Plaintiffs' discussion of federal law regarding associational standing below is appropriate, however, because here is virtually no Arkansas law on the subject. *See infra* Section V.A.4.

[5] The State's reliance on *Wilson v. Pulaski Ass'n of Classroom Teachers*, 330 Ark. 298, at 302, 954 S.W.2d 221, 224 (1997), to suggest that Plaintiffs must establish "irreparable harm and . . . no adequate remedy at law" is misplaced. Defs.' Br. at 18. The problem: *Wilson* has *nothing* to do with standing. The standard quoted by Defendants is the standard for granting a preliminary injunction. *Wilson*, 330 Ark. at 302–03, 954 S.W.2d at 224 ("Clearly, for equity to act, there must be proof of (1) irreparable harm and (2) no adequate remedy at law. *Thus, in order for a chancellor to grant a preliminary injunction, the moving party must establish irreparable harm.*" (emphasis added)).

556 S.W.3d 509, 515 (2014)). Defendants nonetheless argue that the Voter Plaintiffs lack standing because they have alleged only speculative injuries. *See* Defs.' Br. at 19. This argument, based on inapposite federal law, defies Arkansas' standing jurisprudence, and the Court may quickly dispose of it. Here, all the Voter Plaintiffs are registered voters and therefore have standing to challenge the Challenged Provisions. *See supra* Section III.A.

Even if being a registered voter were not enough to establish standing, there is substantial evidence demonstrating that the Voter Plaintiffs will be injured by the Challenged Provisions. *See, e.g.*, Ex. A, Watkins Dep. 8:10–16; 18:17–20; 23:4–7 (Watkins' signature varies due to health condition, and she is concerned absentee ballot application will be rejected because of the Absentee Application Signature Match Requirement); Ex. E, Rust Dep. 11:22–12:1; 14:6–18; 17:9–19; 18:8–12; 19:11–18 (same with regard to Rust); Ex. E, Rust Dep. 16:16–17:3; 20:10–21; 21:7–22:2; 33:9–21 (Rust has dropped off absentee ballot in person due to concerns about mail delivery times and may do so again in the future); Watkins Ex. A, Dep. 11:16–21; 16:16–20 (Watkins has health condition that requires her to have water periodically and has been forced to wait in long lines to vote); Ex. E, Rust Dep. 27:12–28:4 (Rust unsure if wife can support him in line to vote under Voter Support Ban and it would be more difficult to vote in person without that support); Ex. EE, Dunlap Aff. ¶¶ 6-7 (Dunlap unlikely to renew driver's license when it expires because she rarely drives and would need an affidavit option to vote in elections after her license expires).

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Relying again on federal case law, Defendants assert these injuries do not establish standing because they are "speculative" and not sufficiently imminent to warrant pre-enforcement review. *See* Defs.' Br. at 19. But injuries need not have already occurred for Plaintiffs to obtain standing. The Supreme Court rejected this argument in *Kohls*, where the plaintiffs were registered voters who challenged a voter-identification law *before* the 2014 elections. 2014 Ark. 427, at *1–

4, 444 S.W.3d 844, 846–47. The Court held that the voter plaintiffs had to show only that they "were among the class of persons affected by the legislation." *Id.* at *8, 444 S.W.3d at 849. The Court specifically rejected the Secretary's arguments that the plaintiffs lacked standing because they did not offer proof "that they suffered an injury or harm." *Id.*

In fact, even under the standards applied in the inapplicable federal case law that Defendants rely so single-mindedly upon, the evidence produced by Plaintiffs is sufficient to establish standing. Federal courts recognize that plaintiffs have standing to sue based on a future injury if they establish "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1161 (11th Cir. 2008) (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). An anticipated injury is sufficiently imminent so long as it will "occur with some fixed period of time in the future. . . ." *Id.* And voters or organizations representing voters have standing where they establish a "realistic danger" of an injury occurring during or before an election. *Id.*; *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1268 (N.D. Ga. 2019) (explaining that plaintiffs in voting rights suit can "demonstrate a time period in which the injury will occur (*i.e.* prior to the next scheduled elections). There is no speculation that elections will occur; thus, this satisfies the 'imminent' requirement"). The cases cited by Defendants are inapposite or unhelpful to them. *See Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 150 (2014) (acknowledging pre-enforcement judicial review *is* appropriate when "credible threat" exists that law will be enforced against plaintiff); *Braitberg v. Charter Comms., Inc.*, 836 F.3d 925, 930 (8th Cir. 2016) (denying standing where plaintiff challenging company's retention of personal information could not identify *any* "material risk of harm").

Defendants' arguments that the Voter Plaintiffs lack standing should be rejected.

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3. The Challenged Provisions will directly injure the Organizational Plaintiffs.

Defendants also wrongly assert that the Organizational Plaintiffs do not have direct standing. The evidence demonstrates that the Organizational Plaintiffs will suffer harm sufficient to confer standing on them directly: they will be forced to divert resources to ameliorate the negative effects of the Challenged Provisions, the Challenged Provisions frustrate their missions, and Act 728 bars them from engaging in protected expressive conduct. Defendants' efforts to neutralize that evidence at best emphasize the genuine dispute of fact.

There is substantial evidence demonstrating that the Organizational Plaintiffs will be forced to divert resources to overcome the negative effects of the Challenged Provisions on Arkansas' voters. Even under more demanding federal standing jurisprudence, organizational plaintiffs do not have a heavy burden to demonstrate a diversion of resource injury. *Fair Fight Action, Inc.*, 413 F. Supp. 3d at 1266 (stating organizations need only show a "reasonabl[e] anticipati[on] the organization will need to divert resources in the future" to establish standing). Plaintiffs have produced more than enough evidence to demonstrate such an injury. Each Organizational Plaintiff will need to devote significant resources to updating its educational materials to reflect changes in the new laws. Ex. F, Miller Dep. 15:15–23 (the League cannot change its materials or begin educating on the Challenged Provisions "overnight"), 16:2–18 (changing the League's materials "requires time and effort of volunteers, and is not something that is easy to do"); 23:15–24:7 (educating on the Challenged Provisions is "a lot of work" and "requires pulling resources from other areas and time of volunteers"); Ex. DD, Miller Aff. ¶ 6 (updating Government in Arkansas book is "a time-consuming process that requires review and agreement from multiple individuals"); *see* Ex. G, Reith Dep. 34:1–36:24; 38:2–12 (AU translates materials into Spanish, and it must work with national partners to determine the "most culturally appropriate definitions

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that would be understandable to [its] communities" and pairs these efforts with community education efforts); *see also* Ex. T, Reith Aff. ¶¶ 5–10 (explaining how AU will be forced to divert resources). Both Organizational Plaintiffs have resource challenges, and to educate voters about the Challenged Provisions, will need to expend resources that otherwise would be used for other activities or to educate voters or communities about other matters. Ex. F, Miller Dep. 23:15–24:7 (the League would need to "pull[] resources from other areas" to educate about the Challenged Provisions); Ex. G, Reith Dep. 19:16–25, 56:6–20 (AU is already "stretched," does not receive specific grants to educate about changes in laws, and would have to "divert resources to make sure adequate education services are given to members in [its] community"); *see also* Ex. T, Reith Aff. ¶¶ 5–10.

Defendants' arguments to the contrary are—at best—grounded in highly disputed facts, and thus prevent summary judgment. For example, Defendants argue that the Organizational Plaintiffs will not need to divert resources because of the Challenged Provisions because Plaintiffs have held trainings and created written materials that do not address the Challenged Provisions since the Challenged Provisions were enacted. Defs.' Br. at 21, 22. But Plaintiffs are not required to divert all of their resources to address the Challenged Provisions, nor are they required to have already done so to establish standing under Arkansas—or even federal—law. That they have educated members on other matters since the passage of the Challenged Provisions is utterly irrelevant to the question of whether they will be forced to divert resources to ameliorate the negative effects of the Challenged Provisions before the next election, which is the standing question before the Court. *See Fla. State Conf. of NAACP*, 522 F.3d at 1161; *Fair Fight Action, Inc.*, 413 F. Supp. 3d at 1268. Under Defendants' theory no organizational plaintiff could have standing based on a diversion of resource injury unless it abandons all unrelated activities and

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marshals all its resources toward addressing the challenged laws once they go into effect. This is not the law.

Next, Defendants assert that the Organizational Plaintiffs will not need to divert resources because they need only make "minor adjustments in effecting their respective missions" because of the laws. Defs.' Br. at 21. But again, this ignores substantial evidence to the contrary, including testimony about the significant effort the Organizational Plaintiffs must undertake to update their educational materials and ensure that members are fully educated about the laws and the steps necessary to attempt to mitigate the burdens imposed by avoid being negatively impacted by them. Ex. F, Miller Dep. 15:15–23, 23:15–24:7; *see* Ex. G, Reith Dep. 23:16–24:2, 36:18–24, 34:1–36:2; 38:2–12; Ex. T, Reith Aff. ¶¶ 5, 7–10. This is especially burdensome given that even Defendants are uncertain about what some of the Challenged Provisions mean. *See supra* Section III.D.4 (setting out Defendants' shifting positions on what Act 728's Voter Support Ban means); *see also* Ex. J, Bridges Dep. 126:11-18 (incorrectly testifying that, under Act 736, clerks can still use "whatever is tied to that registrant record" and that prior absentee ballot applications, for example, "would be fair game in order to compare those signatures.").

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Additionally, Defendants argue AU will not be forced to divert resources to ameliorate the effects of the Challenged Provisions because "part of [AU's] general services grant includes an education component." Defs.' Br. at 22. Defendants assume that as long as AU is engaging in or receives any funds for educating about *anything at all*, then it does not have to divert resources to educate about the Challenged Provisions. This is simply false—both factually and legally. *See OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610–12 (5th Cir. 2017) (finding standing where an organization that generally engaged in civic education had to expend resources to educate voters on the laws at issue); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1350–51 (11th Cir. 2009)

(finding standing where organization had to shift resources from regular activities, which included general voter education, to educate voters about the challenged laws). The Organizational Plaintiffs must do significant work to understand the Challenged Provisions, update their materials, and repeatedly inform voters or members about how to avoid their negative effects. Ex. F, Miller Dep. 15:15–23, 23:15–24:7; *see* Ex. G, Reith Dep. 23:16–24:2, 36:18–24, 34:1–36:2; 38:2–12; Ex. T, Reith Aff. ¶¶ 5, 7–10. AU's resources are not infinite, and if it must use funds to undertake that costly, those funds cannot be used for other purposes, including educating voters and members about other matters. Ex. G, Reith Dep. 19:16–25.

Repeatedly, Defendants ignore almost entirely Plaintiffs' evidence of the myriad types of injuries that the Challenged Provisions impose on them as organizations. Defendants do not even address Plaintiffs' evidence that the Challenged Provisions harm both Organizational Plaintiffs by frustrating their missions of facilitating voting, Ex. F, Miller Dep. 13:4–14, and promoting civic engagement and democratic participation, *see* Ex. G, Reith Dep. 21:5–7. The Challenged Provisions frustrate these missions by making it more difficult for qualified Arkansans to vote, *infra* Section E, and more likely that qualified voters will be disenfranchised because election officials erroneously reject their signatures, *infra* Section V.E.1, or because they will be unable to obtain qualifying ID, *infra* V.E.3, or timely return their absentee ballot, *infra* Section V.E.2.

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Defendants also ignore that both Organizational Plaintiffs are directly injured by the Voter Support Ban, which will prevent them from effecting their mission by supporting voters waiting in line and from engaging in protected political speech and association, either alone or in coalition with like-minded organizations. *Infra* V.F. Defendants assert that the Organizational Plaintiffs will not be injured by Act 728 because it does not prohibit activities like handing out water or snacks, but Defendants' own contradictory assertions about Act 728 create a genuine issue of disputed fact

on this point. *Infra* V.F; *see also supra* Section III.D.4. Defendants also conclude that the Organizational Plaintiffs cannot be harmed by Act 728 because voters already in line to vote do not need encouragement to vote. Defs' Br. at 22. Not only does this ignore the fact that voters enduring long lines most certainly *do* need encouragement, support, and sustenance to stay in line rather than to leave without voting, *see, e.g.*¸ *N.A.A.C.P. State Conference of Pa. v. Cortés*, 591 F. Supp. 2d 757, 761 (E.D. Pa. 2008) (describing voters leaving polling places without voting because the lines were too long), it also utterly disregards the expressive and associational injury Act 728 will inflict on the Organizational Plaintiffs. *See infra* Section V.F.

Defendants also repeat their mistaken refrain that the Organizational Plaintiffs' injuries are speculative and insufficiently imminent to sustain a pre-enforcement challenge. Defs.' Br. at 19. But, as with the Voter Plaintiffs, even if the federal law cited by Defendants applied here—and it does not—the Organizational Plaintiffs would still have standing because they have alleged sufficiently imminent and concrete prospective injuries. *See supra* Section V.A.3.

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Finally, Defendants assert that the Organizational Plaintiffs lack standing because neither "is a 'person' affected by the" Challenged Provisions. Defs.' Br. at 18–19. But the question before the Court is whether "a *litigant*" will suffer an injury or "belong[s] to a class that is prejudiced in order to have standing to challenge the validity of a law." *Ghegan*, 338 Ark. 9, at 14–15, 991 S.W.2d 536, 539 (emphasis added); *see also Moore*, 369 Ark. 498, at 504, 256 S.W.3d 488, 493 (recognizing association's standing); *First United Bank v. Phase II*, 347 Ark. 879, at 893, 69 S.W.3d 33, 43 (2002) (summarizing state law holding that "a person *or party* who has a pecuniary interest in the outcome of the action has standing to assert a claim on his or its behalf" (emphasis added)).

Accordingly, Plaintiffs have produced sufficient evidence to create a dispute of material

fact (at the very least) that, like the Voter Plaintiffs, the Organizational Plaintiffs have direct standing to challenge the Challenged Provisions. Defendants' arguments should be rejected.

4. The Organizational Plaintiffs also have associational standing.

Defendants also argue the Organizational Plaintiffs lack associational standing. But the evidence demonstrates that the League and AU have associational standing on behalf of their members and constituents. Specifically, Plaintiffs have produced evidence that, for both the League and AU: (1) their members would otherwise have standing to sue in their own right; (2) the interests they seek to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013) (discussing these requirements). Defendants' assertion that that the Organizational Plaintiffs cannot satisfy any prong of this test, Defs.' Br. at 20, 23-24, is, therefore, mistaken.[6]

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As to the first factor, Defendants' suggestion that "it is not possible for the Court to know whether the Plaintiffs' members ever will be affected by the challenged acts in any way whatsoever," Defs.' Br. at 12, is contrary to the evidence already produced by Plaintiffs. The Organizational Plaintiffs have described in great detail how the Challenged Provisions will harm their members. *See* Ex. G, Reith Dep. 9:15–10:2, 26:15–27:9, 30:1–19, 37:8–38:12, 45:21–22, 46:1–16; Ex. DD, Miller Aff. ¶¶ 7–11. Moreover, three individual plaintiffs—Dortha Dunlap, Nell Matthews Mock, and Patsy Watkins—are members of the League and have standing by virtue of being registered voters in Arkansas. *Supra* Sections III.A, V.A.2. And the injuries alleged on

[6] Arkansas case law is silent on associational standing. This silence is likely the result of state law expressly providing for non-profit organizations to assert associational standing until it was repealed in 2012. *See* Ark. Code Ann. § 4-28-507 (repealed 2012). Virtually all states have embraced associational standing doctrine, as have federal courts. *See Int'l Union of Operating Eng'rs v. Ill. Dep't of Empl. Sec.*, 828 N.E.2d 1104, 1112 (Ill. 2005) (collecting cases); *see also Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342–43 (1977).

behalf of the Organizational Plaintiffs' members are sufficiently concrete: Plaintiffs have established a realistic probability that their members will suffer an imminent injury during or before the next election. *See* Ex. G, Reith Dep. 9:15–10:2, 26:15–27:9, 30:1–19, 37:8–38:12, 45:21–22, 46:1–16; Ex. DD, Miller Aff. ¶¶ 7–11.

Defendants nevertheless assert that the Organizational Plaintiffs lack associational standing because neither has named an individual member who will be harmed. Defs.' Br. at 20. But federal courts have rejected this argument in similar circumstances, holding that organizations need not name specific members who will be injured when the organization alleges prospective harms. "When the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future." *Fla. State Conf. of N.A.A.C.P.*, 522 F.3d at 1160. Because the Organizational Plaintiffs allege prospective harm, they need not predict which specific members will be harmed to have standing. And, in any case, the League *has* identified specific members who will be harmed by the Challenged Provisions. *Supra* III.A (identifying individual Plaintiffs as members of the League).

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Next, Defendants argue that the interests the Organizational Plaintiffs seek to protect are not germane to their missions because "[n]either purports to be an organization working to ensure Black voters are not disenfranchised." Defs.' Br. at 23. This assertion ignores the evidence demonstrating that both the League and AU effectuate their respective missions by ensuring that *all* Arkansas voters' ballots are properly cast and counted. *See supra* Section III.A. The Organizational Plaintiffs, therefore, have an interest in protecting Arkansans from being disenfranchised or subjected to unjustifiable burdens on their fundamental right to vote. In any event, both the League and AU have Black members. *See supra* Section III.A.

Defendants incorrectly assert state that the Organizational Plaintiffs cannot demonstrate "that the claims asserted and the relief requested do not require the participation of individual members in the lawsuit." Defs.' Br. at 20. Defendants are wrong. Members need not participate in a suit brought by an organization on their behalf when a court can adjudicate the claims and award relief requested without "consider[ing] the individual circumstances of any aggrieved . . . member." *Int'l Union, United Auto., Aerospace and Agr. Implement Workers of Am. v. Brock*, 477 U.S. 274, 287–88 (1986). Here, the Court need not consider specific evidence regarding individual circumstances of members' injuries to determine how the Challenged Provisions burden the rights of voters, including specific categories of voters, nor must it evaluate particularized circumstances of individual members to award the declaratory and injunctive relief requested by Plaintiffs. *See Conn. State Dental Ass'n v. Anthem Health Plans, Inc.*, 591 F.3d 1337, 1354 (11th Cir. 2009) ("Damage claims are incompatible with associational standing because such claims usually require 'individualized proof.' . . . [D]eclaratory and injunctive relief, [however,] are normally appropriate relief for associational standing . . . .").

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Accordingly, the League and AU have produced sufficient evidence to establish, at a minimum, a dispute of material fact as to whether they have associational standing.

B. The Challenged Provisions are subject to strict scrutiny review because they burden the fundamental rights to vote, speak, and assemble.

Because the Challenged Provisions infringe upon fundamental rights to vote, speak, and assemble, *see infra* at Sections V.E-F, they are subject to strict scrutiny. "When a statute infringes upon a fundamental right," it is subject to strict scrutiny and "cannot survive unless 'a compelling state interest is advanced by the statute and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350 (quoting *Thompson v. Ark. Social Servs.*, 282 Ark. 369, 374, 669 S.W.2d 878, 880 (1984)). But even if the

evidence produced in this case did not establish that the Challenged Provisions burden fundamental rights, at the very least, it gives rise to a material dispute of fact as to whether the Challenged Provisions burden fundamental rights. *See Flentje*, 340 Ark. 563, at 570, 11 S.W.3d at 536.

As set forth below: (1) all four of the Challenged Provisions violate the Free and Equal Elections Clause, Ark. Const. art. 2 § 3, and the Equal Protection Clause, Ark. Const. art. 2 § 3; (2) the Absentee Application Signature-Match Requirement and the In-Person Ballot Receipt Deadline, Acts 736 and 973 respectively, violate the Voter Qualifications Clause, Ark. Const. art. 2 § 1; and (3) the Voter Support Ban, Act 728, violates the rights to freedom of speech and assembly in the Arkansas Constitution, Ark. Const. art. 2 § 4; Ark. Const. art. 2 § 6. *See infra* at Sections V.E-F.

The right to have one's ballot counted free from arbitrary interference is a fundamental right guaranteed by Article 3, section 2 of the Arkansas Constitution. *Davidson v. Rhea*, 221 Ark. 885, 256 S.W.2d 744 (1953);[7] *Henderson v. Gladish*, 198 Ark. 217, 217, 128 S.W.2d 257, 262 (1939). So are the rights to freedom of speech and assembly. *See e.g.*, Ark. Code Ann. § 6-60-1002 (characterizing "freedom of speech as a fundamental right for all"). Accordingly, *Defendants* must prove that "'a compelling state interest is advanced by [Act 728] and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley*, 349 Ark. 600, at 632, 80 S.W.3d at 350 (quoting *Thompson*, 282 Ark. 369, at 374, 669 S.W.2d at 880).

As a result of the injuries that the Challenged Provisions inflict on the fundamental rights to vote, speak, and assemble, the burden shifts to Defendants to establish that "'a compelling state

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[7] Defendants wrongly suggest that Plaintiffs have relied on *Davidson* in setting forth the applicable standard of review. Defs.' Br. at 31. Defendants are wrong. Plaintiffs have cited, and continue to cite, *Davidson* for (the otherwise obvious) proposition that the right to vote as enshrined in Article 3, section 2 of the Arkansas Constitution a fundamental right. It is *Jegley* that sets forth the legal standard on the merits for a law alleged to violate a fundamental right. 349 Ark. 600, at 632, 80 S.W.3d at 350.

interest is advanced by the [Challenged Provisions] and [that they are] the least restrictive method available to carry out [the] state interest.'" *Jegley*, 349 Ark. 600, at 632, 80 S.W.3d 332, 350 (quoting *Thompson*, 282 Ark. 369, at 374, 669 S.W.2d at 880). Defendants have not even approached satisfaction of this evidentiary burden. *See infra* at Sections V.F-G.

Moreover, while the evidence produced in this case establishes that each of the Challenged Provisions alone imposes significant burdens on fundamental rights, these burdens do not exist in a vacuum. Instead, the burdens that the Challenged Provisions impose on the fundamental rights to vote, speak, and assemble must be considered *together*, in the context of all of Arkansas's election laws, with explicit regard for their cumulative harm. *See, e.g.*, *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 733 (M.D. Tenn. 2019) (finding a law burdens the fundamental right to suffrage in considering the "Cumulative Burdens of the Act"); *see also Burdick v. Takushi*, 504 U.S. 428, 434–37 (1992) (considering the challenged laws in the context of all of Hawaii's ballot access laws in assessing the scope of the burden imposed); *Williams v. Rhodes*, 393 U.S. 23, 38 (1968) (finding that, "[t]aken together," various provisions make ballot access and the ability to vote for a third party candidate "difficult, if not impossible").

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Defendants continue to argue that *none* of the Challenged Provisions implicate, let alone infringe upon, any fundamental right, and therefore that the Challenged Provisions must survive so long as they have a rational basis. *See e.g.*, Defs.' Br. at 3 (arguing that "the acts involve election mechanics only" and are subject to "rational-basis review"). But Defendants cannot prevail on this theory on summary judgment because there is, at minimum, a "genuine remaining issue of fact" as to the burdens Plaintiffs allege, *Flentje*, 340 Ark. 563, at 570, 11 S.W.3d at 536. Defendants bear the burden of demonstrating that they are entitled to summary judgment, and "[a]ll proof submitted must be viewed in a light most favorable to the party resisting that motion, [with] any

doubts and inferences . . . resolved against the moving party." *Cash*, 322 Ark. 359, at 361, 908 S.W.2d at 656 (quoting *Oglesby*, 319 Ark. 280, at 284, 891 S.W.2d at 50); *see also infra* at Section V.E.

Here, strict scrutiny is appropriate because, individually *and* cumulatively, the Challenged Provisions impede fundamental rights by making it harder for Arkansans to participate in our democracy, to engage in core, nonpartisan political speech, and to assemble.

C. The Challenged Provisions are subject to strict scrutiny because they implicate suspect classifications.

The Challenged Provisions implicate suspect classifications in violation of Article 2, Section 3 of the Constitution, which guarantees that "[t]he equality of all persons before the law . . . shall ever remain inviolate; nor shall any citizen ever be deprived of any right, privilege or immunity; nor exempted from any burden or duty, on account of race, color or previous condition." When an equal protection challenge implicates a "suspect classification"—such as a classification based on race—it "warrant[s] strict scrutiny." *Howton v. State*, 2021 Ark. App. 86, at 7, 619 S.W.3d 29, 35 (2021). And, in any event, *each* of the Challenged Provisions is otherwise subject to strict scrutiny because each abridges and impedes the exercise of fundamental rights. *See Jegley*, 349 Ark. 600 at 632, 80 S.W.3d at 350. Even if a less exacting level of scrutiny applied here—and it does not—the Challenged Provisions would not survive review because they create arbitrary distinctions that further no interest—other than making it harder to vote, that is—and therefore lack any rational basis.

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Specifically, the evidence shows (1) Act 736 makes arbitrary classifications between similarly-situated applicants whose signatures are deemed to match their original voter registration application and applicants whose signatures do not, based on the error-prone assessments of laypeople who are untrained in signature comparison, *see supra* at Section III.D.1; (2) Act 973

imposes arbitrary distinctions between absentee voters who return their ballots by mail versus those who return them in person, *see supra* at Section III.D.2; (3) Act 249 imposes arbitrary distinctions based on whether a voter possesses acceptable identification, *see supra* at Section III.D.3; and (4) Act 728 imposes arbitrary distinctions on voters based on whether they reside in a county or precinct that has exceedingly long lines to vote, particularly in predominately-Black communities, *see* Mayer Rep. at 21 (nationally, minority voters face longer wait times than white voters); Ex. R, Stein Dep. 229:13.

D. Even if this Court were to adopt the federal standard for evaluating voting rights claims for the *first time* in Arkansas, the Challenged Provisions would still be subject to heightened review.

Defendants argue for application of federal standards in place of Arkansas standards of law. Even if the Court were to adopt the federal test for whether a law burdens the right to vote in violation of the First and Fourteenth Amendments to the United States Constitution, Plaintiffs' claims would still be subject to heightened review.

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As an initial matter, Defendants' citation to *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 271, 872 S.W.2d 349, 359-60 (1994) (plurality), to claim that the Arkansas Supreme Court has applied the federal *Anderson-Burdick* balancing test to voting rights claims under the Arkansas Constitution is misleading. The *only* mention of the federal test was in evaluating claims that the challenged law violated the "First and Fourteenth Amendments to the U.S. Constitution." *U.S. Term Limits, Inc. v. Hill*, 316 Ark. 251, 270, 872 S.W.2d 349, 359 (1994), *aff'd sub nom. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995). Nowhere in that decision, or in any other of which counsel is aware, has the Arkansas Supreme Court *ever* adopted *Anderson-Burdick* for voting rights claims brought under Arkansas's Constitution.

Nevertheless, even if *Anderson-Burdick* did apply, Defendants' argument that it would result in rational basis review is wrong. When courts consider a challenge to state election laws

under the First and Fourteenth Amendments to the United States Constitution, they apply a flexible standard outlined by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, (1983), and *Burdick*, 504 U.S. 428 (1992). This standard is often referred to as the *Anderson-Burdick* balancing test, as it requires the Court to "weigh 'the character and magnitude of the asserted injury to the rights . . . that the plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* at 434 (quoting *Anderson*, 460 U.S. at 789). It is a "flexible" sliding scale, where "the rigorousness of [the court's] inquiry . . . depends upon the extent to which [the challenged law] burdens [voting rights]." *Id.*

When the right to vote is subject to a "severe" restriction, the law is subject to *strict scrutiny* and therefore "must be narrowly drawn to advance a state interest of compelling importance." *Norman v. Reed*, 502 U.S. 279, 280 (1992). Defendants incorrectly assert that anything less than a severe burden is subject to rational basis review, *see e.g.*, Defs.' Br. at 34 (erroneously stating that the inquiry turns on whether Plaintiffs have alleged "any *severe* burden"), but this is wrong. Lesser burdens remain subject to balancing and, in most instances, heightened or intermediate review. "However slight" the burden on voting rights "may appear," "it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 191 (2008) (controlling op.) (quoting *Norman*, 502 U.S. at 288-89). Courts must apply this standard to "[t]he precise character of the state's action and the nature of the burden on voters." *Ne. Ohio Coal. for Homeless v. Husted*, 696 F.3d 580, 591-93 (6th Cir. 2012) ("*NEOCH*") (quotation marks omitted). In this balancing, vague or speculative state interests lack weight: a state must identify its "precise interests" in the challenged provision.

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Burdick, 504 U.S. at 434.

Rational basis review is proper under the federal standards only when plaintiffs fail to establish *any* burden on the fundamental right to vote. *See Obama for Am. v. Husted*, 697 F.3d 423, 429 (6th Cir. 2012) (citing *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 807–09, 89 S. Ct. 1404, 22 L.Ed.2d 739 (1969) (applying rational basis to a state statute that prohibited plaintiffs' access to absentee ballots where no burden on the right to vote was shown); *Biener v. Calio*, 361 F.3d 206, 214–15 (3d Cir. 2004) (applying rational basis where there was no showing of an "infringement on the fundamental right to vote")).

Thus, even if this Court were to apply the *Anderson-Burdick* balancing standard for the first time when considering a claim under the Arkansas Constitution, some heightened level of scrutiny must apply, because Plaintiffs have plainly established a burden on the right to vote, and Defendants have not come close to establishing sufficient interests. *See infra* at Section V.E.

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E. The Challenged Provisions impair or forfeit the fundamental right to vote.

As set out below, the Challenged Provisions impair or forfeit the right to vote in violation of Article 3, Section 2 of the Arkansas Constitution, which guarantees that "[e]lections shall be free and equal," and that "[n]o power, civil or military, shall ever interfere to prevent the free exercise of the right of suffrage; nor shall any law be enacted whereby such right shall be impaired or forfeited . . . ," as well as the Voter Qualifications Clause in Article 3, Section 1, which guarantees that "any person" can vote as long as they are at least eighteen, a U.S. citizen, an Arkansas resident, and verify their identity. But even if the evidence did not clearly establish that the Challenged Provisions impair or forfeit the right to vote (it does), at *bare minimum*, the evidence gives rise to a dispute of material fact as to the factual question of whether the Challenged Provisions infringe upon the fundamental right to vote, *see Flentje*, 340 Ark. 563 at 570, 11 S.W.3d at 536, particularly given that "[a]ll proof submitted must be viewed in a light most favorable to

the party resisting the motion, [with] any doubts and inferences . . . resolved against the moving party." *Cash*, 322 Ark. 359, at 361, 908 S.W.2d at 656 (quoting *Oglesby*, 319 Ark. 280, at 284, 891 S.W.2d at 50). Defendants fall far short of their burden, and their Motion should be denied. *See id.* at 365, 908 S.W.2d at 658.

1. Act 736's Absentee Application Signature-Match Requirement impairs or forfeits the right to vote.

Act 736's Absentee Application Signature-Match Requirement unconstitutionally impairs or forfeits the fundamental right to vote as guaranteed under Article 3, Section 2 of the Constitution, and the Voter Qualification Clause of Article 3, Section 1, by imposing a new requirement on voters not contained within the Constitution, *i.e.*, that the voter's signature on her absentee ballot application match the signature on her registration application.

Specifically, the Requirement makes the signature matching process for obtaining an absentee ballot even more error-prone and arbitrary by restricting the universe of signatures canvassers can use when engaging in the process. *See supra* at Section III.D.1. Before the passage of Act 736, elections officials who processed applications for absentee ballots could compare the voter's name, address, date of birth, and signature against registration "records." *See supra* at Section III.D.1. Now, they are limited to comparing the absentee-ballot application signature with the *single* signature from the voter's registration application. Doing so makes this process even more susceptible to error because signatures "can and do change," and often "significantly," and using only a single comparator increases the rate of erroneous rejections. *See* Ex. N, Mohammed Aff. ¶¶ 35–49. Act 736 unjustifiably requires voters to sign their absentee-ballot application in the same exact way they signed their registration application, which could have been signed *decades* prior. *Supra* at Section III.D.1.

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Act 736's new mandate will impede and, in some cases, entirely deny lawful voters their right to vote absentee as a result of arbitrary decisions by non-expert elections officials who are ill-equipped to accurately determine whether two signatures were in fact made by the same person. *Supra* at Section III.D.1. This is especially true because factors such as age, illness, injury, medicine, eyesight, alcohol, and drugs, and mechanical factors such as the pen type affect a person's signature and increase the odds of arbitrary rejection of an absentee application by the voter. *See* Ex. N, Mohammed Aff. ¶ 41. Moreover, given that, aside from the 2020 election, absentee voting is only available to people who are overseas, in the military, unavoidably absent from their voting place on election day, or unable to vote on election day because of illness or physical disability, and who therefore cannot vote by any other method, Act 736 will result in the complete disenfranchisement of many voters. *See* Ark. Code Ann. § 7-5-402, § 7-5-406. This is worsened because election officials receive no training in comparing voter signatures, something one of the sponsors of Act 736 in the General Assembly admitted on the floor. Ex. M, Rep. Lowery Test., at 19:12-17 (Representative Lowery admitted that it was deeply problematic to "ask[] our election workers, many of them who are not trained in verifying signatures, . . . to do it in seconds," while some forensic analysts say it sometimes takes hours to verify a signature.); *see also* Ex. K, Shults Dep. 138:11-139:13, 140:6-141:1; Ex. J, Bridges Dep. 130:22-131:4.

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a. Act 736 imposes severe burdens on Voter Plaintiffs and the Organizational Plaintiffs' members.

Plaintiffs have proffered extensive proof that Act 736 impairs or forfeits their fundamental right to vote. For example, Ms. Watkins has arthritis in her hand, and so her signature "varies from day to day" and is "totally unpredictable." Ex. A, Watkins Dep. 8:10-20, 23:4-7. Because her "arthritis is progressive," her signature will "likely" continue to change as time passes. *Id.* 8:18-22. Similarly, Mr. Rust voted absentee during the 2020 general election has difficulty signing his

name as a result of tremors in his hands and problems with his eyesight including macular degeneration and a cataract lens replacement. Ex. E, Rust Dep. 11:22-12:1, 12:19-20, 14:6-18, 17:9-19, 19:11-18. Because of these physical issues, his signature varies from one day to the next. *Id.* 18:8-12. Ms. Mock has problems with her hands, including arthritis and a loss of connective tissue, that have caused her signature to get "worse and worse" over time. Ex. B, Mock Dep. 11:22-12:12, 13:8-25.

AU explained that signature matching is particularly problematic for its Hispanic and Asian members because they are more likely to have "four names [or] five names" on their birth certificates and may not recall how they signed their name when they originally registered to vote Ex. G, Reith Dep. 26:17-27:17. AU testified that the Act will "require awareness building within [its] members . . . that if they are choosing the absentee ballot that there's going to be special attention on the signature match. And if they have any reason to believe that their signature has changed, which it frequently does as part of the immigration life cycles for many of [AU's] members, that they're going to need to do that additional due diligence." *Id.* 30:1-19.

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The Board itself agrees that the signature of a voter that's "been registered for some amount of time can vary with time." Ex. K, Shults Dep. 143:10-15. Studies show that several groups of individuals, including "illiterate writers, writers for whom English is a second language, elderly writers, disabled writers, and writers with health conditions[,] tend to have less pen control than most other writers, and therefore would have a greater range of variation in their signatures." Ex. N, Mohammed Aff. ¶ 42. Young voters, too, are likely to have a greater range of variation in their signatures. *Id.* at ¶ 44. Act 973 will likely cause individuals from these groups to have their signatures rejected at higher rates because their signatures exhibit greater ranges of variation and because Act 973 requires signature matching by untrained examiners who are more likely to make

such erroneous rejections. *Id.* ¶¶ 28, 42–44, 45–48. The Absentee Application Signature-Match Requirement will exacerbate errors by limiting untrained examiners to only a single comparator signature. *See id.* ¶¶ 30, 54.

Considering these facts in the light most favorable to Plaintiffs as the non-moving party, the Court simply cannot countenance Defendants' assertion that it is somehow undisputed that Act 736 does not implicate, let alone significantly burden, the right to vote.

b. Defendants' attempts to minimize the burden created by the Absentee Application Signature-Match Requirement lack merit.

Defendants suggest that because voters can theoretically update their voter registration with the county clerk at any time, the Act does not impose a burden on the right to vote. *See* Defs.' Br. at 44. Requiring voters to complete extra steps to re-register to vote before every election is itself an extreme burden on the right vote, particularly for elderly voters with health issues that impact their signature. But even if that were not the case, multiple plaintiffs testified, as explained above, that their signature varies from day to day depending on the circumstances or due to a progressive condition. *Supra* Section V.E.1.a. For a voter in that situation, ensuring an updated voter registration signature could require updating one's voter registration "on a regular basis before every election." Ex. A, Watkins Dep. 9:18-22; *see also id.* 23:21-25 ("[I]t requires me and anyone else in my situation to have to renew that voter registration before every election in order to keep a current signature on file."). And even that might not be effective, given the rate of variation in some voters' signatures. *See* Ex. E, Rust Dep. 20:5-9 (explaining his concern that, even if he were to reregister to vote now, his signature might still change between now and October 2022).

During depositions, Defendants asked some Voter Plaintiffs to sign their names multiple times in a row, and Defendants now suggest that because the Plaintiffs agreed that those signatures appear "similar," they will not be affected by the Absentee Application Signature-Match. *See, e.g.*,

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Defs.' Br. at 6; Ex. A, Watkins Dep. 24:1-8. If the Plaintiffs were the judges of their own signatures on their absentee ballots, this hypothetical might be meaningful, but it completely misses the reality of the burdens and risks of error under the Absentee Application Signature-Match Requirement. However, the similarity of several signatures written one after the other is irrelevant to whether a signature on a future absentee ballot application might compare to a signature from a past voter registration record created years or even decades ago. The Board itself agrees that the signature of a voter that's "been registered for some amount of time can vary with time." Ex. K, Shults Dep. 143:10-15. Indeed, Mr. Rust has had a had a traveler's check rejected because his two close-in-time signatures "didn't match very well." Ex. R, Rust Dep. 18:13-19:9.

c. Act 736 is an unnecessary and unreliable means of addressing voter fraud, which is virtually nonexistent in Arkansas.

Even if some less exacting level of scrutiny applied (it does not), the evidence establishes that Act 736's Requirement is wholly unnecessary to prevent the specter of voter fraud, which does not exist to any real degree in Arkansas and is prevented under other provisions of the Election Code. *See generally* Ark. Code Ann. § 7-1-104 (2021).

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The purported justification for the Absentee Ballot Application Signature-Matching Requirement is to prevent "any potential voting fraud via the absentee ballot." Ex. J, Bridges Dep. 127:4-8. However, neither the Secretary nor the Board is aware of any voter fraud in the past election by way of an absentee ballot. Ex. J, Bridges Dep. 51:1-6; Ex. K, Shults Dep. 172:5-173:1.

Moreover, Arkansas election officials have acknowledged the potential for error in signature matching. A Board report from a previous election explained that signature "[v]ariations are often explained by the fact that signatures vary over time and the signature on file may be on file for many years or several decades." Ex. V at 3, 2017-0008 Staff Rep. One former Pulaski County official testified that when absentee ballot canvassers "compare the signatures, they don't

take into account variables that may come into play . . . They were probably done at different times of the day, or maybe blood sugar was low at one point." Ex. W, Camp Dep. 36:11-20

Indeed, when "verifying" signatures on initiative petitions, the Secretary's Office does not engage in any matching or comparison of signatures at all, but rather approves or rejects signatures based on the "printed name, date of birth and address of that voter in order to determine if that individual voter was a registered voter when they signed the petition and in what county they signed that petition." Ex. J, Bridges Dep. 13:7-17; *id*. at 132-33. The Secretary's Office testified that this same information is contained on absentee ballot applications. *Id.* at 133:10-12. However, rather than rely on the same datapoints to ensure voter eligibility for petition signatures, Act 736 requires entirely untrained election officials to decide whether an absentee ballot is provided to a voter based on whether they subjectively determine the voter's signature on their absentee ballot application matches their signature on their voter registration application. *See* Ex. K, Shults Dep. at 139:14-140:4 (no training by the Board); Ex. J, Bridges Dep at 130:13-21 (no training by the Secretary's Office); *id.* at 131:3-4 (no training by the counties).

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And there is absolutely *no* justification for limiting the comparator signatures that can be used to verify a voter's absentee ballot application. As the Secretary's Office admitted, allowing local election officials to use several signature comparators would make the inherently flawed process of comparing signatures at least somewhat more accurate: "The more documentation that [local election officials] have scanned in to that record the better because of the fact that it could give multiple examples of a signature. Because, as we all know, signatures aren't always perfectly identical so they can change, of course." Ex. J, Bridges Dep. 128:17-22.

Defendants incorrectly suggest that Act 736 did not change the number of comparator signatures on which election officials may rely when matching the signature on a voter's absentee

ballot application to her original voter registration is simply incorrect. *See* Defs.' Br. at 43 (attempting to rely on Ms. Inman to imply that Act 736 changed nothing). Defendant, the State Board of Election Commissioners, which has the duty and authority to interpret and enforce the election laws of the state, admitted under oath that the very purpose of Act 736 is to limit the comparator signatures that election officials could use to only one: the voter's registration application signature. Ex. K, Shults Dep. at 140:6-141:1; *see also* Ex. L, 2020-039 Inves. Rep. (explaining that, pre-Act 736, the clerk's office could attempt to obtain a signature for the voter from "retained paper poll books or early vote request sheets"). That some election officials are confused, including (apparently) those in the Secretary of State's Office, *see* Ex. J, Bridges Dep. 126:11-18 (incorrectly testifying that clerks can use "whatever is tied to that registrant record" and that prior absentee ballot applications, for example, "would be fair game in order to compare those signatures"), hardly helps Defendants' case. Instead, it suggests that local election officials will also be confused—no doubt due to the absence of guidance from Defendants, who are charged with interpreting and enforcing the law—resulting in disparate treatment for absentee voters depending on the county in which they live and how their local clerk is applying the law.

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Even if Defendants had an interest in preventing something that does not exist in Arkansas, the arbitrary Absentee Application Signature-Match Requirement would not promote that interest. Forcing Arkansas absentee voters to try to recreate a signature used when they first registered to vote years or decades earlier is far more likely to result in wrongful disenfranchisement than preventing nonexistent absentee voting fraud. *See supra* at Section III.D.1. Accordingly, the Court should deny Defendants' motion for summary judgment as to Count I.

2. Act 973's In-Person Ballot Receipt Deadline impairs or forfeits the right to vote.

Act 973's In-Person Ballot Receipt Deadline unconstitutionally impairs or forfeits the fundamental right to vote in violation in violation of Article 3, Section 2 of the Constitution and the Voter Qualification Clause of Article 3, Section 1 by imposing a disparate temporal deadline on absentee voters who return their ballots in person that does not appear in the Constitution.

The evidence provides ample proof of the burdens that Act 973 imposes. For example, AU's "members tend to make their voting plans [the] weekend before election day." Ex. G, Reith Dep. 44:21-22. This is because its members are "susceptible to quick work schedule changes" that disrupt their voting plans at the last minute, making the unduly onerous in-person deadline more likely to affect or disenfranchise them. *Id.* 45:1-5. For example, some members are "truck drivers or others who don't know until much closer to election day whether they are actually going to be physically present or not." *Id.* 44:17-21.

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While Defendants claim that Arkansas voters may obtain their ballots earlier, and this somehow mitigates Act 973's burdens, *see* Defs.' Br. at 46, prohibiting an absentee voter from considering late-breaking facts up to and through the weekend before election day independently burdens the right to vote. *See* Ex. E, Rust Dep. 24:4-26:10 (explaining that, in 2017, an initiative was struck from the ballot after voting had already begun and, therefore, voters who cast their ballots beforehand and voted for the stricken initiative were disenfranchised as to that issue).

In addition, Act 973 increases the informational costs of voting by absentee ballot. Ex. H, Mayer Rep. at 21. Absentee voters must track separate deadlines for returning absentee ballots in person versus by mail, and academic studies show that increased complexity in voting laws reduces both aggregate turnout and the likelihood that an individual will vote. *Id.* at 5, 17, 19, 21. Ultimately, "Act 973 will drive the absentee ballot rejection rate higher than it is now,

disenfranchising voters who attempt to submit an absentee ballot." *Id.* at 21. To make this worse, Defendants have failed to update their websites and training materials, providing false information to voters that, if relied on, would have disenfranchised them. Ex. J, Bridges Dep., 102:10-105:11 (acknowledging that the incorrect deadline was on the Secretary's website at the time of the deposition, despite that several elections had occurred since, and would have mislead voters and, at least theoretically left some voters without the opportunity to vote—that is, disenfranchised).

Individually and collectively with the other Challenged Provisions, Act 973 impinges upon the right to vote, and therefore heightened scrutiny must apply. *See supra* at Section V.B. In fact, the Governor refused to sign Act 973 for exactly these reasons, explaining that the In-Person Ballot Receipt Deadline "unnecessarily limits the opportunities for voters to cast their ballot prior to the election." Ex. S, Governor Statement. The Governor was right: there is no rational, let alone compelling, justification for this arbitrary and burdensome change to the law.

Defendants' claim that there is an administrative benefit to moving the deadline to hand deliver an absentee ballot to the Friday before election day is unavailing, because the Secretary's Office admits that the process for hand delivering an absentee ballot is essentially the same as the process for voting early and in person, which is permitted through the Monday before election day. *See* Ex. J, Bridges Dep. 113-14 (admitting that under both processes, the clerk must check the voter or designated bearer in, check that individuals photo identification, and have that individual sign a poll book or a bearer log); *see also* Ark. Code Ann. § 7-5-418(a)(1)(A) (2021). This claim is even more confounding considering admissions by both the Secretary's Office and the Board that they have absolutely no idea how many absentee ballots have been returned in person in any prior election. *See* Ex. J, Bridges Dep. at 115:11-14; *see also* Ex. K, Shults Dep. 96:1-5.

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Accordingly, even if some less exacting level of scrutiny applied, Act 973 still would not pass constitutional muster. The Court should, therefore, deny Defendants' motion for summary judgment as to Count II.

3. Act 249's Affidavit Prohibition impairs or forfeits the right to vote.

Act 249's Affidavit Prohibition impairs or forfeits the right to vote in violation of Article 3, Section 2 of the Constitution. Specifically, the Affidavit Prohibition puts thousands of Arkansas voters who lack acceptable photo identification in jeopardy of disenfranchisement. *See* Ex. H, Mayer Rep. at 19 (explaining that, in the 2020 general election, 1,612 voters in Pulaski County alone avoided disenfranchisement by casting their ballot using the Affidavit Fail-Safe); *see also* Ex. G, Reith Dep. 37:8-23, 46:1-16 (explaining that the Affidavit Prohibition puts AU's members at risk of disenfranchisement, "especially because of the name match issue as related to their ID"). And the burdens imposed by the Affidavit Prohibition will have "larger effects on identifiable subpopulations, particularly minorities, the elderly, and groups with lower incomes and education." Ex. H, Mayer Rep. at 18.[8]

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But even Arkansas voters with acceptable identification are at risk of disenfranchisement or serious burdens under the Affidavit Prohibition, because if they vote absentee, they must now enclose a copy of their identification with their absentee ballot. *Id.* at 19. If these voters do not have a photocopier at home, they will have to bring their identification to their county election officials to have their ballots counted. *Id.* This imposes burdens on voters who must take additional steps to present themselves at their county election offices in person and/or do not have the

[8] Earlier studies on the effect of strict voter ID laws produced mixed results, but more recent ones reached the much stronger conclusion that strict voter ID laws reduce turnout and have larger effects on certain subpopulations. Ex. K, Mayer Rep. at 18. These more recent studies are more reliable than the older ones, which were based on limited data, as only a few states had strict voter ID laws at the time, and the limited data was "insufficient to reach clear conclusions." *Id*. More recent studies are based on more states and more election cycles and are therefore more reliable. *See id.* To the extent Defendants' expert disputes any of this, then that just proves the point: there are issues of material fact that must be resolved at trial, and the Court should deny Defendants' motion for summary judgment.

necessary equipment to make copies of their identification. *Id.* at 19. Many of AU's members, for example, do not have access to a photocopier at home or work. Ex. G, Reith Dep. 45:13-23.

Moreover, absentee voters may have difficulty presenting their ID in person because of the very "illness, infirmity, or limited mobility that makes them unable to vote in person." Ex. H, Mayer Rep. at 19. As explained in an email sent by the Pope County Clerk to an email list of Arkansas County Clerks, "[r]equiring a second trip to a county clerk's office or election commission office in the days following an election could impose an undue burden on some people, and in some cases might not even be possible. . . . [And for absentee voters,] requiring people who by definition are UNABLE to attend a polling site to make a trip to a specific location in order for their vote to be counted is unfair." Ex. X, Affidavit Prohibition Email at 2.

Defendants claim the Affidavit Prohibition imposes a minimal burden on the right to vote because each county clerk's office is required to make free identification cards available to voters. Defs.' Br. at 37. However, to obtain such a card, a voter must go to the county clerk's office, likely during the workweek, and provide both a document listing their full legal name and date or birth, as well as a document containing a residential address. Ex. K, Shults Dep. 84:1-4, 85:14-22. The Board does not track how many free voter identification cards have been issued. Ex. K, Shults Dep. 86:10-13. In response to a records request, however, the Cross County Clerk indicated, for example, that it had never issued a single voter card. Ex. Y, Cross County Resp. The Board's training material for county commissioners does not even contain information on how to obtain free voter identification cards. Ex. K, Shults Dep. 88:14-89-10. Obtaining a voter verification card—were a voter to somehow independently learn that such a thing exists—is also burdensome, particularly for elderly or infirmed voters with limited mobility, including those who vote absentee for that reason. *See id.* 84:1-4, 85:14-22 (explaining what is required to apply for an obtain a voter

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verification card); Ex. H, Mayer Rep. at 18 (explaining disparate impacts of strict voter identification on various voter populations; *see also* Ark. Code Ann. § 7-5-402, § 7-5-406 (2013) (limiting who is eligible to vote absentee).

All told, the Voter ID Affidavit Prohibition "increases the cost of voting, and will almost certainly result in otherwise eligible Arkansas voters being unable to cast a ballot that will be counted." Ex. H, Mayer Rep. at 19.

i. Defendants' justifications of the Affidavit Prohibition are inadequate.

Even if some less exacting level of scrutiny applies (it does not), the evidence shows that Affidavit Prohibition is unnecessary to prevent voter fraud, which is virtually nonexistent in Arkansas and is prevented under existing laws. *See supra* at Section III.D. Defendants concede that they lack evidence of a single instance of fraud arising from the Affidavit Fail-Safe, and instead claim that the purpose of the Affidavit Prohibition is merely to "remove[] the *conceivable* occurrence that someone could utilize the [Affidavit Fail-Safe] to commit voter fraud." Defs.' Br. at 40 (emphasis added). Even if Defendants had an interest in preventing something that does not occur in Arkansas, the Affidavit Prohibition does not serve, and is not in any way tailored to carry out, that interest. *See Archer v. Sigma Tau Gamma Alpha Epsilon, Inc.*, 2010 Ark. 8, at 12, 362 S.W.3d 303, 309–10 (2010) (even under the least stringent rational-basis test, a challenged law must be rationally related to achieving a legitimate governmental objective under any reasonably conceivable fact situation.).[9]

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[9] Defendants' reliance on federal law for the proposition that a "conceivable" justification for Act 249 is enough to make it constitutional is based on several incorrect assumptions. *See* Defs.' Br. at 39 (citing *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 488-89 (1955) and arguing that any "'conceivable' or hypothetical rational basis suffices to save [the] law"). First, Defendants' argument assumes that the *Anderson-Burdick* applies to claims under the Arkansas Constitution; it does not. *See supra* at Section V.D. Second, it assumes that, if *Anderson-Burdick* applied, Act 249 would be subject to rational basis review, which is also incorrect. *See id*. Defendants argue that, because the United States Supreme Court held that a voter identification challenged under the U.S. Constitution was subject to rational basis review, that any voter identification law challenged under the Arkansas Constitution must also be subject to

Defendants do not even deny that Act 249 impairs or impedes the right to vote in violation of Article 3, Section 2; instead, they argue that the disenfranchisement and other impairments of the right to vote imposed by Act 249 are immaterial, because they are foreclosed by this Court's decision in *Haas*, 2018 Ark. 283, 556 S.W.3d 509. As the history of voter identification laws in Arkansas shows, Defendants are incorrect and their reliance on *Haas* is misplaced.

In 1999, the General Assembly passed Act 1454, requiring election officials to *request* to see a document confirming a voter's identification before casting a ballot. This remained Arkansas law for seventeen years, and, over the course of all elections conducted under the watchful eye of this law, there have been just *four* criminal convictions of voter fraud in the state out of tens of millions of ballots cast. Ex. H, Mayer Rep. at 15-16. In 2013, the General Assembly attempted to impose a *strict* photo identification law through Act 595. This Court struck down that law as unconstitutional in *Kohls*, 2014 Ark. 427, 444 S.W.3d 844. Act 595 "require[d]," without exception, "proof of identity in the form of a voter-identification card or a document or identification card showing the voter's name and photo issued by the United States, the State of Arkansas, or an accredited postsecondary educational institution in Arkansas with an expiration date." *Id.* at 2, 444 S.W.3d at 846. The Court held that Act 595 violated the Constitution by imposing additional qualifications on the right to vote not contained in Article 3, Section 1. *Id.* at 11, 444 S.W.3d at 851. The Court rejected the State's argument that Act 595 was simply "a

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rational basis review. Defs.' Br. at 35-36 (citing *Crawford*, 553 U.S. at 194). However, Defendants are necessarily wrong given *Kohls*, 2014 Ark. 427, 444 S.W.3d 844—a decision striking down as unconstitutional a voter identification law that was nearly identical to Act 249 (and, frankly, was nearly identical to the one at issue in *Crawford*)—six years after the Supreme Court decision in *Crawford*, despite the State's attempted reliance on *Crawford* in that very case. *Id.*, at 10, 444 S.W.3d at 850.

procedural means of determining whether an Arkansas voter can 'lawfully register[] to vote in the election.'" *Id*. at 15, 444 S.W.3d at 853 (quoting Ark. Const. art. 3, § 1(4)).

In 2017, the General Assembly enacted Act 633, which, unlike Act 595, included the Affidavit Fail-Safe to ensure that voters lacking identification—or absentee voters lacking a photocopier—could still vote by signing an attestation of identity under penalty of perjury. Act 633 also amended Amendment 51, § 13(b)(4) and (5) of the Constitution to provide that, to establish that voters "are legally qualified to vote in that election, each voter shall verify his or her registration by" either presenting photo identification or casting a provisional ballot along with a sworn statement under penalty of perjury (the Affidavit Fail-Safe) attesting to the fact that "the voter is registered to vote in this state and that he or she is the person registered to vote." H.B. 1047, 91st Gen. Assemb., Reg. Sess. (Ark. 2017).

Act 633 was challenged in *Haas*, based on an assertion that its modifications to Amendment 51, § 13(b)(4) and (5) were unlawful, because the General Assembly may only amend Sections 5 through 15 of Amendment 51 "so long as such amendments are *germane to* this amendment, and *consistent with its policy and purposes*." Ark. Const. amend. 51, § 19 (1964) (emphases added). Amendment 51's policy and purpose are to abolish the poll tax and provide a regulatory scheme governing the *registration* of voters. *Haas*, 2018 Ark. 283, at 10, 556 S.W.3d at 516. The plaintiff in *Haas* argued that requiring either photo identification *or a sworn statement* was not germane to or consistent with the policy or purpose of Amendment 51. However, the Court held: "We cannot say that Act 633's constitutional amendment is *clearly* not germane to Amendment 51 and not consistent with its policy and purpose." *Id.* at 13, 556 S.W.3d at 517. Importantly, Act 633's Affidavit Fail-Safe mitigated against any risk of disenfranchisement. *Id.* at

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8; 556 S.W.3d at 515 (explaining that under Act 633, appellee would be required to either "show compliant identification or sign the voter-verification affidavit").

In 2017, the General Assembly approved Issue 2 to be included on the ballot in the November 2018 general election. The ballot title provided: "An amendment to the Arkansas Constitution concerning the presentation of valid photographic identification when voting; requiring that a voter present valid photographic identification when voting in person or when casting an absentee ballot; and providing that the State of Arkansas issue photographic identification at no charge to eligible voters lacking photographic identification." H.J.R. 1016, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (hereinafter "H.J.R. 1016").

Once passed, Issue 2, which became Amendment 99, amended Article 3, Section 1 of the Arkansas Constitution to include an additional qualification to vote, providing that:

> (b)(1) In addition to the qualifications under subsection (a) of this section, the General Assembly shall provide by law that a voter shall: (A) Present valid photographic identification before receiving a ballot to vote in person; and (B) Enclose a copy of valid photographic identification with his or her ballot when voting by absentee ballot.

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HJR 1016 at 2. Amendment 99 did not change the voter identification law itself but instead directed the General Assembly to later pass a law requiring Arkansans to present valid photo ID to cast a *non-provisional* ballot. *Id.* Indeed, Act 633 and its Affidavit Fail-Safe remained in place after the passage of Amendment 99, including during the 2020 general election. *See* Ex. K, Shults Dep. 56:3-57:3, 57:22-58:5, 58:15-22 (explaining that, not only was the Affidavit Fail-Safe used in 2020, but it did also not result in one single documented instance of voter fraud); Ex. J, Bridges Dep. 59:8-60:2 (similar).

Importantly, Amendment 99 provided that a voter lacking acceptable identification shall be permitted to cast a provisional ballot, and that ballot must be counted "if the voter subsequently

certifies the provisional ballot in a manner provided by law." H.J.R. 1016 at 2. Thus, the amendment explicitly contemplated a process by which voters lacking identification could still successfully vote. As a result, the Affidavit Fail-Safe was not inconsistent with Amendment 99 because it was a method "provided by law" for the subsequent certification of a voter's provisional ballot. After all, Amendment 99 *did not* amend Amendment 51, § 13(b)(4) and (5) of the Arkansas Constitution, which continued to provide that a provisional ballot cast by a voter without acceptable photo identification would be counted upon signing the sworn statement or Affidavit Fail-Safe, requiring no further action by the voter. Accordingly, Amendment 99 did *not* require the elimination of the Affidavit Fail-Safe, which continued to allow voters without acceptable photo identification (or a photocopier and printer, in the case of absentee voters) to avoid disenfranchisement.

Act 249, in contrast, *eliminated* the Affidavit Fail-Safe by amending Amendment 51, § 13(b)(4) and (5) and Arkansas Code § 7-5-308(f) (2021) to remove the Affidavit Fail-Safe option, thereby resurrecting the same strict voter ID law this Court struck down in *Martin v. Kohls*. Defendants nonetheless argue that *Haas* requires this Court to find that eliminating the Affidavit Fail-Safe is germane to and consistent with Amendment 51's purpose of abolishing poll taxes and "establish[ing] a system of permanent personal registration as a means of determining that all who cast ballots in general, special and primary elections in this State are legally qualified to vote in such elections, in accordance with the Constitution of Arkansas and the Constitution of the United States." Ark. Const. amend. 51, § 1 (1964). Not so. Just because the Court found that a system of voter verification that included the failsafe option and therefore carried no risk of disenfranchisement was not *clearly* inconsistent with Amendment 51's policy and purpose, does

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not mean that *any* system of voter verification, including one *without* a failsafe option, is germane to and consistent with Amendment 51's policy and purpose.

Act 249 is remarkably different in its impact on voters than Act 633, and Act 249 therefore requires a fresh analysis under Amendment 51, § 19 to determine whether eliminating the Affidavit Fail-Safe is consistent with and germane to the purpose of Amendment 51. It is not: Eliminating the option for voters to prove their identity by signing an affirmation under the penalty of perjury is *neither* germane to nor consistent with Amendment 51's purpose of creating a voter registration system and abolishing the poll tax. To hold otherwise would give the General Assembly *carte blanche* to impose *any* method of voter verification—such as a law permitting voters to utilize only passports or concealed carry permits to vote—and claim consistency with the Arkansas Constitution. *Haas* presented a different issue against the background of the Affidavit Fail-Safe and does not support Defendants' argument on Act 249.

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Accordingly, all that remains is the merits determination of whether Act 249 impairs or impedes the right to vote in violation of the Constitution. The evidence reflects that it does. At the very least, when considering the evidence in the light most favorable to Plaintiffs as the non-moving party, as is required on a motion for summary judgment, the evidence establishes a material dispute as to that fact. *See Cash*, 322 Ark. 359, at 362, 908 S.W.2d at 656 (quoting *Oglesby*, 319 Ark. 280, at 284, 891 S.W.2d at 50). Therefore, the Court should deny Defendants' motion for summary judgment as to Count III.

4. Act 728's Voter Support Ban unconstitutionally impairs or forfeits the right to vote.

Act 728's Voter Support Ban unconstitutionally impairs or forfeits the fundamental right to vote in violation of Article 3, Section 2 of the Constitution.

The Ban directly burdens voters by prohibiting nonpartisan groups from providing free food and water to them while they wait in sometimes unreasonably long lines to vote. Arkansans have faced long lines to vote in several past elections. For example, a prospective voter in a 2016 election alerted the Board that he waited in line for an hour and a half during early voting and the line never moved. Ex. AA, 2016-021 Compl. ("[I]t shouldn't be so difficult to vote that even able-bodied 21 year olds can not [sic] even vote early."). Similarly, an election monitor in the 2018 general election notified the Board that lines at a Crittenden County polling site had "persisted throughout the day" and were "approximately 25 people long." Ex. BB, 2018-067 Inves. Rep. During the 2020 general election, then-Chairwoman of the Pulaski County Election Commission Evelyn Gomez alerted her fellow commissioners that lines at early voting sites were "averaging around an hour." Ex. CC, Gomez Email. Commissioner Gomez emphasized that "[a]n hour in line is way too long." *Id.* Photos produced by Defendants also appear to show long lines of voters during the 2020 general election. Ex. Z, Line Photo.

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The Ban also burdens voters by prohibiting them from having a friend or family member wait with and provide them support while they wait in line to vote. *See e.g.*, Ex. E, Rust Dep. 27:12-28:4 (Mr. Rust testifying that is more difficult for him to vote in person if someone is not able to wait in line with him). The Voter Support Ban will also ultimately impose "disproportionate burdens on poor and minority voters," whose communities have most often been affected by long lines to vote, because of the "lack of clarity about what constitutes a 'lawful purpose'" which "creates . . . risks for the unequal application of poll worker discretion." Ex. H, Mayer Rep. at 21; *see also supra* at Section III.D.4 (explaining Defendants' shifting and contradictory positions on what Act 728 prohibits or permits).

Act 728 would unconstitutionally burden voters even if less exacting level of scrutiny applied (it does not), because there is no state interest that could possibly be served by Act 728's burdens on the right to vote that are not already prohibited by law. Specifically, Defendants claim that Act 728 is necessary to prohibit electioneering within the 100-foot perimeter of a polling place, but this is nonsensical because electioneering is already banned within the 100-foot perimeter around a polling place under a criminal statute that carries with it a hefty fine and up to a year in jail. *See* Ark. Code Ann. § 7-1-103(a)(8)(B) (2021).

Defendants also claim that Act 728 also serves to prevent "voter intimidation," but, like electioneering, voter intimidation (either inside or outside of the 100-foot perimeter) is also already illegal. Ark. Code Ann. § 7-1-104(a)(5) (2021) (it is a "felony . . . for any person to make any threat or attempt to intimidate any elector or the family, business, or profession of the elector"); 18 U.S. Code § 594 (1994) ("Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose . . . shall be fined under this title or imprisoned not more than one year, or both."). Act 728 would be mere surplusage if its actual purpose was to further that (already accomplished) end. The Court should deny the motion for summary judgment as to Count IV.

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F. The Voter Support Ban abridges the fundamental rights to free speech and assembly.

Act 728 also infringes upon AU's and the League's freedom of speech and association, in violation of Article 2, Section 4 of the Constitution, which guarantees that the right of the people to peaceably "assembl[e], consult for the common good[,] and to petition . . . shall never be abridged," as well as in violation of Article 2, Section 6, which decrees that "[t]he free communication of thoughts and opinions[] is one of the most invaluable rights of man." As the

Supreme Court has explained, Arkansas's constitutional guarantee of free speech provides at least as much protection as the First Amendment. *See McDaniel v. Spencer*, 2015 Ark. 94, at 8, 457 S.W.3d 641, 649 (2015).

The First Amendment (and thus the Arkansas Constitution) protects the rights of free speech and expression, particularly the "interactive communication concerning political change" that is appropriately described as "core political speech." *Buckley v. Am. Const. Law Found., Inc.*, 525 U.S. 182, 186 (1999) (quoting *Meyer v. Grant*, 486 U.S. 414, 422 (1988)). Under federal law, limitations on such speech and expression are subject to "exacting scrutiny." *Id.* at 202 (citing *Buckley v. Valeo*, 424 U.S. 1, 45 (1976)). This standard requires defendants to prove that the restriction is "substantially related to important governmental interests" and that the interest cannot be served by "less problematic measures." *Id.* at 202, 204. Under Arkansas law, because the rights to freedom of speech and assembly are fundamental, *see e.g.*, Ark. Code Ann. § 6-60-1002(6) (2019) (characterizing "freedom of speech as a fundamental right for all"), *Defendants* must prove that "'a compelling state interest is advanced by [Act 728] and the statute is the least restrictive method available to carry out [the] state interest.'" *Jegley*, 349 Ark. 600, at 632, 80 S.W.3d at 350 (quoting *Thompson*, 282 Ark. 369, at 374, 669 S.W.2d at 880).

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Defendants seek to obscure the expressive act of providing aid to voters who must endure sometimes hours-long lines to exercise their right to vote by claiming that "Act 728 does not implicate the right to speech or expression at all," Defs.' Br. at 51; they suggest that supporting voters cannot be an expression of solidarity, support, or encouragement to participate in our democracy because, according to Defendants, "voters present at a polling location almost certainly do not need anyone's encouragement to vote as that is why the voters are presumably there in the first place." *Id.* at 22. Defendants' argument that the conduct of supporting voters is not expressive

because it is, to Defendants, *unnecessary*, has no basis in law but also ignores the reality of how difficult voting is for some Arkansans, *see e.g.*, Ex. AA, 2016-021 Compl. (complaining of unreasonably long lines to vote); *see also* Ex. BB, 2018-068 Inves. Rep. (similar); Ex. CC, Gomez Email (citing wait times of one hour in Pulaski County during the 2020 general election), particularly Arkansans of color who have historically had to wait in some of the longest lines in the state. *See* Ex. R, Stein Dep. 229:13–17.

Supporting voters suffering long lines to vote by providing them free water and snacks *is* expressive, regardless of whether Defendants deem that expression "necessary." The Eleventh Circuit recognizes that food-sharing demonstrations are expressive conduct protected by the First Amendment where the organization providing food to the public "establish[s] an intent to 'express[] an idea through activity,' and the reasonable observer would interpret its food sharing events as conveying *some* sort of message." *Fort Lauderdale Food Not Bombs v. City of Fort Lauderdale*, 901 F.3d 1235, 1243 (11th Cir. 2018) (emphasis in original) (citing *Spence v. Wash.*, 418 U.S. 405, 411 (1974)).

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This is true of the line relief efforts that AU and the League would engage in, if not for the Ban, which the League engaged in prior to the Ban, and which AU had worked in coalition with other groups to engage in prior to the Ban. *See* Ex. F, Miller Dep. 52:11-23, 53:14-54:2, 56:1-4, 56:22-25, 57:6-9, 57:22-58:9; Ex. G, Reith Dep. 39:7-16., 39:19-24, 46:17-24. During the 2020 general election, League volunteers set up within the 100-foot zone at a polling location and provided water. Ex. F, Miller Dep 52:11-23, 53:14-54:2, 56:1-4, 56:22-25, 57:6-9. The League explained that it "want[s] to show [its] support for voting and for the franchise," and "one way [it] express[es] that is by being present and visible." *Id.* 57:22-58:9. During that same election, AU provided water and snacks to voters outside the 100-foot zone, "because [AU] is part of coalitions

with other civic engagement partners who [AU] knew were offering those services, like the Urban League and Indivisible." Ex. G, Reith Dep. 39:7-11, 39:19-24. AU "desire[s] the option" to provide water and snacks to individuals in line in future elections, particularly because "those partners may not have the ability [to assist voters] or may not exist in subsequent election cycles." *Id.* 46:17-24. AU testified that providing water and snacks to voters while they are in line communicates that "the democratic process is open and welcoming and that every voter is going to be respected and enabled and supported to be part of the democratic process." *Id.* 66:6-14. AU explained that when voters "see long lines [and] people sweating, uncomfortable . . . a bottled water, a snack makes all the difference. It means you're welcomed, you're encouraged to stay, your vote matters. And with communities like [AU's], where many times they're first-time voters, that just – that symbol is everything to them." *Id.* 67:2-23; *see also id.* 52:3-11. By providing refreshment to individuals queuing to vote—but not, for example, to individuals queuing at a post office—Plaintiffs' message is clear: those who endure long lines to participate in Arkansas's elections should be celebrated and supported.

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Of course, a "narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995) (recognizing "if confined to expressions conveying a 'particularized message,' [the First Amendment] would never reach the unquestionably shielded painting of Jackson Pollack, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll"). The conduct must simply be expressive, and even Defendants cannot deny that the conduct that the Organizational Plaintiffs wish to engage in here fits that bill.

Here, the evidence establishes that Act 728 triggers *and* fails strict scrutiny. Defendants have admitted Act 728 prohibits Appellees from handing water to voters waiting in line and within

100 feet of the polling place. *See* Defs.' Mot. to Dismiss at 22 ("Act 728 does not prevent any organization . . . from leaving coolers full of water or snacks within 100 feet of the 'primary exterior entrance to a building, where voting is taking place . . .'"); *see also* Ex. Q, Hammer Test. at 9:17–10–13) (testifying that Act 728 was drafted with the express purpose of prohibiting individuals from "camping out" within the 100-foot perimeter of the polling place for the purpose of "handing out bottled waters and other things").[10]

This activity constitutes protected core political speech because it encourages voters to stay in line and vote, thus serving the League's and AU's missions of promoting civic engagement and ensuring eligible voters can cast a ballot. Defendants' only justifications for Act 728 are to prevent electioneering and intimidation, Defs.' Br. at 48-51, but Act 728 is not tailored to that interest because it criminalizes non-electioneering activity, and electioneering is *already* prohibited by existing law. *See* Ark. Code Ann. § 7-1-103(a)(8) (2021). Nor is Act 728 substantially related to prohibiting voter intimidation, which is likewise *already* prohibited. Ark. Code Ann. § 7-1-104(a)(5) (2021). Indeed, the United States Supreme Court has made clear that a restriction on speech cannot be supported by a putative interest in preventing conduct that is *already* prohibited under state law and "generic criminal statutes." *McCullen v. Coakley*, 573 U.S. 464, 490–92 (2014) (holding that Massachusetts law creating abortion clinic "buffer zones" could not meet the tailoring requirement because the challenged law had a separate provision that already prohibited much of the conduct the state's asserted interest sought to address, as did other "generic criminal statutes.").

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[10] Moreover, AU expressed concerned "that anybody accompanying or assisting in voting might be interpreted as having an unlawful purpose." Ex. G, Reith Dep. 40:23-41:6. AU is "also concerned about the impact that [the Act] is going to have on [its] ability to recruit volunteers. Because if they are aware that now there is a potential criminal penalty if for some reason a poll worker was to perceive or interpret that what they were doing was unlawful, that will make it much more difficult for [AU] to recruit the volunteers necessary to offer . . . interpretation support." *Id.* 41:7-14.

Even if some less exacting level of scrutiny applied (it does not), Act 728's Ban cannot survive even the least rigorous review, because Defendants' purported justifications for the law are *wholly* unnecessary as electioneering and voter intimidation are both undisputedly already illegal under Arkansas (and federal) law. *See id.* Accordingly, the Court should deny Defendants' motion for summary judgment as to Count IV.

G. Defendants are not entitled to sovereign immunity.

Defendants raise the same sovereign immunity argument they previously raised and lost before this Court. Their argument should be again rejected for the same reasons articulated in Plaintiffs' opposition to the motion to dismiss, this Court's ruling on that motion, and the Arkansas Supreme Court's decision in *Haas*. *See* 2018 Ark. 283, at 8, 556 S.W.3d 509, 515 ("Because appellee has asserted that Act 633 violates qualified voters' constitutional right to vote and seeks declaratory and injunctive relief, not money damages, this action is not subject to the asserted sovereign-immunity defense.").

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VI. Conclusion

For the above-stated reasons, Plaintiffs respectfully request that this Court deny Defendants' motion for summary judgment.

Respectfully submitted, this 20th day of January 2022,

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**Admitted Pro Hac Vice*
*** Motions for Pro Hac Vice Pending*

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CERTIFICATE OF SERVICE

I, Jess Askew III, hereby certify that I served the Clerk of Court with the foregoing on this 20th day of January 2022, via the e-flex electronic filing system, which shall send notice to all counsel of record.

/s/ Jess Askew III
Jess Askew III
KUTAK ROCK III

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